In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-344

ANTON N. J. HEYN,
Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE; HOMER L. HITT; GEORGE C. BRANAM; WILLIAM B. GOOD; and MANUEL L. IBANEZ,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petition of Anton N. J. Heyn respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 31, 1977, a rehearing of which was denied by the United States Court of Appeals for the Fifth Circuit on June 6, 1977.

OPINIONS BELOW

The judgment and per curiam opinion of the United States Court of Appeals for the Fifth Circuit, which is not reported, appears as Appendix "E" hereto.

The opinions of the United States District Court for the Eastern District of Louisiana, reported at 417 F.Supp. 603 (E.D. La. 1976), appear respectively as Appendix "B" and "D" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on March 31, 1977. A Petition for Rehearing En Banc or, Alternatively, for Rehearing by Assigned Panel was filed in the United States Court of Appeals for the Fifth Circuit on April 14, 1977. The Petition for Rehearing was denied on May 9, 1977. On May 23, 1977 the United States Court of Appeals for the Fifth Circuit vacated its May 9, 1977 order denying the Petition for Rehearing. On June 6, 1977 the United States Court of Appeals for the Fifth Circuit denied the Petition for Rehearing.

28 U.S.C. § 1254(1) confers jurisdiction on this Court to review the judgment in question by writ of certiorari.

QUESTIONS FOR REVIEW

This suit was filed pursuant to 42 U.S.C. §1983 as a result of discriminatory employment practices carried out against the plaintiff, a college professor, by the defendant university and certain of its administrators as reprisals for the plaintiff's exercise of his constitutional freedom of speech and to stifle his further exercise of that freedom. The discriminatory practices spanned a period of several years and continued even into the plaintiff's mandatory retirement at the age of 70 in May, 1976. Plaintiff attempted unsuccessfully to obtain non-judicial relief from the discriminatory practices through university channels and otherwise before resorting to the filing of this suit on July 30, 1973. The discrimination continued even after the filing of this suit.

In 1966 and 1967, certain of the defendant administrators made serious written charges against the plaintiff, which were false, including accusations of incompetence, neglect of duty, and forgery, and based upon those charges recommended to plaintiff's superiors that he be discharged for cause. Those false written charges were placed in plaintiff's personnel file maintained by the university and were never made known or disclosed to plaintiff. Plaintiff first learned of the existence of those false charges during discovery in this suit. Those false charges were known to university officials and were relied upon by them in denying plaintiff relief from the discriminatory practices against him.

The district court dismissed the suit upon the ground that all actions against the plaintiff prior to July 31, 1972 were barred by the Louisiana one-year statute of limitations applicable to tort actions and granted summary judgment upon the ground that there were no *allegations* of actions taken against plaintiff after July 31, 1972. The district court denied as moot plaintiff's motion for leave to file an amended complaint with respect to the false written accusations against him which were concealed by defendants until unearthed during discovery in this action. The court of appeals affirmed without oral argument on its summary calendar in a one word per curiam.

The questions presented for review are:

1. What statute of limitations is applicable to this case of unconstitutional discriminatory employment practices.

2. Whether the Louisiana one-year statute of limitations can constitutionally be applied to this case under the supremacy clause.

3. If the one-year statute is applicable does it begin to run before the discriminatory practices cease or before the employment relationship terminates.

4. If the one-year statute is applicable, was it tolled by plaintiff's efforts to obtain non-judicial relief and is *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716 (1975), to apply prospectively only or retroactively also.

5. Whether plaintiff alleged any discriminatory practices after July 31, 1972.

6. Whether plaintiff's amended complaint, which alleged that the false written accusations concealed from him were reprisals for the exercise of his First Amendment freedom of speech and denied him due process and equal protection of the law, was moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article VI, Clause 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ;

> and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The United States Constitution, Amendment I, provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The United States Constitution, Amendment XIV, Section 1 provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Louisiana Civil Code Article 3536 provides in pertinent part:

> "The following actions are also prescribed by one year:
>
> That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

Louisiana Civil Code Article 3544 provides:

> "In general, all personal actions, except those before enumerated, are prescribed by ten years."

STATEMENT OF CASE

Plaintiff is an eminent biophysicist with an international reputation among scientists as one of the foremost authorities in the world in his areas of specialization, cytology and molecular biology. His research is funded by the National Science Foundation (NSF) and others. Linus Pauling, the only man who has been awarded two Nobel prizes, has acclaimed that plaintiff "is the world's leading authority" in the study of the molecular structure of cellulose. Plaintiff's works are widely published and cited.

Plaintiff commenced employment as a full professor of biology and as Chairman of the Department of Biology at the University of New Orleans (UNO), which is a state university, in September 1963. His work has highly praised by his superiors at UNO and he received an $1,800 raise for the 1964 school year. In 1964 plaintiff's superior wrote that it would be a "gross waste of talent" and a "misuse of

ability" for plaintiff to teach freshman biology.

Shortly thereafter in late 1964 and early 1965, plaintiff began to express his opposition to what he considered to be ruthless personnel practices in the firing of qualified but not tenured young teachers at UNO. In protest of those personnel practices, plaintiff voluntarily resigned as Chairman of the Biology Department effective June 1, 1965.

During the same period of time there was strong sentiment by the UNO administration to separate UNO from the Louisiana State University system. Plaintiff openly expressed his opposition to that movement.

On June 9, 1965, plaintiff wrote a memorandum through channels to the Vice-Chancellor of UNO, defendant Branam, criticizing the ruthless firing practices which he opposed. He was severely criticized the next day by Branam for having so expressed his opinion and Branam has testified in depositions that it was "unwise" and "ill-advised" for plaintiff to express his opinions. Immediately thereafter the retributions began. Plaintiff received no raise for the 1965 school year. In fact, his salary was effectively frozen for 5 years as he received only two raises totalling $550 between 1965 and 1970. Plaintiff made many attempts within the university system to have his salary adjusted but was unsuccessful. He finally obtained a small measure of relief with regard to his salary through the American Association of University Professors (AAUP), which forced UNO to give Mr. Heyn a raise for the 1970 school year. It was recognized, however, that plaintiff's salary "has remained at a level unusually low for a man of his rank and service" and since the retributions began, plaintiff's salary has always remained far below (as much as $4,600 per year)

the average salary of other UNO professors.

The retributions taken by UNO against plaintiff for the free exercise of his speech took other forms as well, and, in fact, permeated every aspect of his employment by UNO up to and even after his retirement in 1976. The reprisals included, for example, teaching assignments, sabbatical leave, travel expenses and many unfounded and abusive accusations against plaintiff. With regard to teaching assignments, plaintiff was assigned to teach *exclusively* freshmen courses and has been required to teach 50% more freshmen courses at UNO than any other professor. More than half of the professors at UNO have never taught any freshmen courses. Similarly, plaintiff has been required to teach more freshmen lab courses than any other professor at UNO while more than 80% of the professors have not taught any such courses. In addition, the services of a graduate assistant were not made available to the plaintiff for his freshmen lab courses as was customarily done with other faculty members required to teach those courses. Plaintiff was assigned a much greater teaching load than the other professors at UNO and was not afforded the customary reduction given to other faculty members who, like plaintiff, were engaged in funded research programs. UNO refused to allow plaintiff to continue to teach the courses in his areas of specialization, which he had always previously taught. Plaintiff was assigned to teach more Saturday morning classes than any other professor at UNO.

Plaintiff was invited to teach during his sabbatical leave at the University of Bern in Switzerland as a visiting professor which was a great honor. Although plaintiff was entitled to the sabbatical leave under UNO regulations, it was refused

to him by UNO without any reason. Plaintiff, unlike other professors, was not allowed travel expenses for presenting papers at out-of-state symposia and seminars.

Plaintiff was also repeatedly harrassed by numerous abusive accusations which were completely unfounded. For example, the then 30 year old defendant Ibanez, who became Chairman of the Biology Department when Dr. Heyn resigned that position, repeatedly accused plaintiff in written memoranda, without even consulting him beforehand, of "erratic action", an "arrogant attitude", "irresponsibility and negligence in [his] every-day affairs", "irresponsible behavior", "flagrant violation of university regulations", and other similar characterizations. Plaintiff was compelled and did establish the falsity of each and every such accusation but, of course, he received no apology.

In October 1966, plaintiff appealed to the AAUP for relief with regard to being required to teach exclusively freshmen courses. The AAUP forced UNO to make adjustments in that regard, but other UNO reprisals against plaintiff quickly followed his appeal to the AAUP. In November 1966, defendant Ibanez and defendant Good (Dean of the College of Sciences) collaborated to fabricate the most serious charges against Dr. Heyn. A written memorandum was prepared charging Dr. Heyn with incompetence, neglect of duty, conduct seriously prejudicial to the university, forgery and making false statements to the Selective Service System. That memorandum, dated November 16, 1966, recommended plaintiff's discharge for cause. Defendant Branam, recognizing the memorandum for what it was, refused to act upon it, but it was nevertheless placed in plaintiff's personnel file. A similar memorandum and recommendation were written one year later and were also placed

in plaintiff's personnel file, but again were not acted on. Those charges, which were absolutely false, were never made known to the plaintiff and were concealed from him by defendants. Those charges, however, were known to the university officials and were relied upon to deny plaintiff's various appeals for relief against the discriminatory and abusive practices carried out against him. Plaintiff first learned of the existence of those charges when the memoranda were found in his file during discovery in this action.

Prior to filing this suit, plaintiff made many non-mandatory and non-judicial attempts to obtain relief even though UNO had no established procedures for doing so. For example, in August 1966 he sought relief without avail from the Chancellor of UNO with regard to his teaching assignments; in October 1966 he obtained temporary relief with regard to teaching assignments from the AAUP; in December 1968 and October 1969 plaintiff sought relief without avail from the Chancellor of UNO with regard to his salary; in January 1970 plaintiff obtained some relief from the AAUP with regard to his salary; in June 1970 plaintiff sought relief without avail from the LSU Board of Supervisors with regard to his salary; in February 1971 plaintiff sought relief without avail from the Governor of Louisiana with regard to his various grievances; in July 1972 plaintiff expressed his grievances to the Louisiana Attorney General's Office which conducted an investigation and which advised plaintiff in March 1973 that they were without power to act and recommended that plaintiff seek private counsel. Plaintiff did so and this lawsuit was filed in July 1973. Jurisdiction of the district court was founded on 28 U.S.C. §1343.

After discovery was largely completed a pre-trial conference was held on October 28, 1975, and a lengthy pre-trial order submitted by the parties. Plaintiff listed 77 witnesses in the pre-trial order and submitted several hundred uncontested exhibits to be introduced at the trial. The trial was scheduled to commence on Monday, December 15, 1975.

On November 12, 1975, defendants filed a motion for dismissal and, alternatively, for summary judgment. On the same date plaintiff filed a motion for leave to file an amended complaint as the pre-trial order stated he would do. The amended complaint did not raise any new factual issues, but merely sought to incorporate into the complaint matters brought out in discovery, particularly with respect to the two previously concealed memoranda discussed above and these matters were already included as issues in the pre-trial order. The motions were argued in the district court on November 18, 1975, but the district court did not rule on the motions and the parties prepared for trial. On the Friday afternoon before the trial was to begin, and when plaintiff was fully prepared for trial with witnesses subpoenaed, documents and charts prepared, proposed findings of fact and conclusions of law and a trial brief filed, etc., the district court advised the parties that the trial was continued. On March 12, 1976, the district court issued an order granting defendants' motions to dismiss and for summary judgment, discussed above, and dismissed plaintiff's motion to amend as moot (attached as Appendix "A"). The district court did not issue its reasons until June 7, 1976. Plaintiff's post-hearing motion for a reconsideration was denied on July 26, 1976 (Appendix "D"). Plaintiff appealed to the Fifth Circuit which placed the case on its summary calendar, refused oral argument, issued a one-word decision "Affirmed," and refused rehearing.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *Statute of Limitations*

Congress did not provide a statute of limitations for actions under 42 U.S.C. § 1983. In *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596 (1914), this Court established that state limitation periods are to be applied in § 1983 actions. The lower courts have grappled with the problem of the applicable state statute of limitations with inconsistent and unsatisfactory results. The status of the law has been described and criticized by the law review commentators. Note, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494, 503-504 (1970); Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763 (1968).

There are conflicts between the circuits and even between different panels within the same circuit as illustrated in this case. For example, in *Warren v. Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975), the Eighth Circuit stated:

> "The federal courts have not reached uniform results in determining which state statute of limitations should be applied to various civil actions under the federal civil rights statutes.
>
> * * * * * *
>
> "Conclusions as to which state cause of action is analogous to a particular type of federal civil rights action have varied, as evidenced by this court's treatment of § 1983 actions. In some instances the court on the facts of the particular

> case has characterized the federal civil rights action as similar to a state tort or contract action, and the appropriate state tort or contract limitations period has been applied to the federal civil rights suit. *See, e.g.*, Johnson v. Dailey, 479 F.2d 86 (8th Cir.), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 88 L.Ed. 2d 246 (1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), cert. denied, 405 U.S. 1043, 92 S.Ct. 1327, 31 L.Ed. 2d 585 (1972). The court in another case, however, declined to apply the state limitations period applicable to a tort or contract action, stressing that a federal civil rights action involves more than a tort or breach of contract, and applied alternatively the state statute of limitations for statutorily created liabilities or the limitation for actions not otherwise covered by a statute of limitations. See Glasscoe v. Howell, *supra*. *See also* Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962); Lazard v. Boeing Co., 322 F. Supp. 343 (E.D. La. 1971)."
>
> *Id.* at pp. 733-734.

The approach of the Third Circuit is to apply the state statute of limitations applicable to the state tort action which is most analogous to the § 1983 claim. *Hughes v. Smith*, 389 F.2d 42 (3d Cir. 1968); *Funk v. Cable*, 251 F. Supp. 598 (M.D. Pa. 1966); *Conard v. Stitzel*, 225 F.Supp. 244 (E.D. Pa. 1963). Indeed, this approach has been adopted by some panels in the Fifth Circuit. *Kissinger v. Foti*, 544 F.2d 1257 (5th Cir. 1977); *Bryan v. Jones*, 519 F.2d 44 (5th Cir. 1975). The same approach has also been adopted by some decisions of the Sixth and Seventh Cir-

cuits as well. The Eighth Circuit has stated in *Reed v. Hutto*, 486 F.2d 534 (8th Cir. 1973):

> "Third Circuit decisions and some decisions in the Fifth, Sixth, and Seventh Circuits have applied the statute of limitations of the underlying tort as in *Savage*. THIRD CIRCUIT: Howell v. Cataldi, 464 F.2d 272 (1972); Thomas v. Howard, 455 F.2d 228 (1972); Orlando v. Baltimore & Ohio Ry., 455 F.2d 972 (1972); Hileman v. Knable, 391 F.2d 596 (1968); Hughes v. Smith, 389 F.2d 42 (1968); Henig v. Odorioso, 385 F. 2d 491 (1967), cert. denied, 390 U.S. 1016, 88 S.Ct. 1269, 20 L.Ed. 2d 166 (1968). FIFTH CIRCUIT: Shank v. Spruill, 406 F.2d 756 (1969); Beard v. Stephens, 372 F.2d 685 (1967). SIXTH CIRCUIT: Madison v. Wood, 410 F.2d 564 (1969); Mulligan v. Schlachter, 389 F.2d 231 (1968); Mohler v. Miller, 235 F.2d 153 (1956). SEVENTH CIRCUIT: Jones v. Jones, 410 F.2d 365 (1969), cert. denied, 396 U.S. 1013, 90 S.Ct. 547, 24 L.Ed. 2d 505 (1970)."
>
> *Id.* at p. 537, n. 2.

This approach, however, has been criticized by other circuit court decisions which recognize, as Justice Harlen did in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 196, 81 S.Ct. 473, 486 (1961), that a claim for the denial of constitutional rights is significantly different from and more serious than a common law tort action. *Crawford v. Zeitler*, 326 F.2d 119 (6th Cir. 1964); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962).

Many states, unlike Louisiana, have statutes of limitations specifically applicable to liabilities created by statute. The Second, Fourth, Eighth, and Ninth Circuits and some cases in the Fifth and Sixth Circuits have applied those statutes of limitations to §1983 claims. *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974); *Ortiz v. LaVallee*, 442 F.2d 912 (2d Cir. 1971); *Swan v. Board of Higher Education of City of New York*, 319 F.2d 56 (2d Cir. 1963); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975); *White v. Padgett*, 475 F.2d 79 (5th Cir. 1973); *Nevels v. Wilson*, 423 F.2d 691 (5th Cir. 1970); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975); *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972); *Reed v. Hutto, supra; Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970); *Mills v. Small*, 446 F.2d 249 (9th Cir. 1971); *Smith v. Cremins, supra.* In states, such as Louisiana, which do not have a specific statute of limitations applicable to actions for liabilities created by statute, the District of Columbia Circuit, and some cases in the Fifth and Seventh Circuits apply the state's general or "catch-all" statute of limitations. *Macklin v. Spector Freight Systems,Inc.*, 478 F.2d 979, 994 (D.C. Cir. 1973); *Boshell v. Alabama Mental Health Board*, 473 F.2d 1369 (5th Cir. 1973); *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971); *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972); *Waters v. Wisconsin Steel Wks. of Int'l. Harvester Co.*, 427 F.2d 476 (7th Cir. 1970); *Wakat v. Harlib*, 253 F. 2d 59 (7th Cir. 1958).

Conflict in the decisions of the courts of appeals abounds, even within decisions of the same circuit. No measure of uniformity can be achieved on this very important issue without guidance and direction from this Court.

No doubt part of the problem arises from the fact that the states have diverse statutes of limitations. Louisiana,

unlike many states, has not adopted a statute of limitations specifically applicable to civil rights suits or to actions for liabilities created by statute. Defendants here contend that the Louisiana one-year statute applicable to tort actions (La. C.C. Art. 3536) is applicable whereas plaintiff contends that the applicable period of limitations is ten years, as provided in Louisiana's general or "catch-all" statute (La. C.C. Art. 3544). There are no Louisiana state court decisions on point. The only Louisiana federal court decisions on point are *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971), and *Lazard v. Boeing Co.*, 322 F.Supp. 343 (E.D. La. 1971). In both *Boudreaux* and *Lazard*, claims were presented for discriminatory employment practices for *racial* reasons pursuant to 42 U.S.C. § 1981. In both *Boudreaux* and *Lazard*, the courts held that the applicable period of limitations is the 10-year period provided in Louisiana Civil Code Article 3544. The difference between claims under §1981 and those under §1983 is that § 1981 claims apply only to racial discrimination, *e.g.*, *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1956), cert. denied, 353 U.S. 959, 76 S.Ct. 868. For statute of limitation purposes there is no difference between § 1981 and § 1983 claims, *Mason v. Owens-Illinois, Inc., supra; Baker v. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970), and the decision in this case is therefore contrary to the decisions in *Boudreaux, supra*, and *Lazard, supra*. The result in this case is to create a different period of limitations depending upon whether the victim deprived of civil rights is white or black. No court has ever said that, but if that is to be the law, as it is in this case, the Court should be required to state it.

The decisions in *Boudreaux, supra*, and *Lazard, supra*, are

consistent with the District of Columbia Circuit's approach of applying the general statute of limitations to cases of discriminatory employment practices, *Macklin v. Spector Freight Systems, Inc., supra*, and to the Fifth Circuit's approach to every other discriminatory employment practices case (except this one) which has come before it. *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) (rejecting the Alabama statutes of limitations applicable to torts and applying Alabama's general statute of limitations, Code of Alabama Title 7, Section 26); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5th Cir. 1973) (stating at p. 924 "civil rights statutes have generally been held governed by the limitations on liabilities created by statutes."). Since the Fifth Circuit did not deem it appropriate to issue an opinion in this case, it is impossible to determine on what basis the Fifth Circuit decided to deviate from the rule in the Fifth Circuit in this case. Further, if the Fifth Circuit has decided to change the rule as to the applicable statute of limitations, which it did in this case, the rule should be applied prospectively only under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), which would preclude its application to this case.

Other reasons mandate the application of the ten-year statute to this case. Plaintiff's claims are founded in part, as recognized by the district court, on defendants' violation of plaintiff's contractual tenure rights. In Louisiana, actions for contractual violations are governed by the 10-year period provided in Civil Code Article 3544. *Louisiana Sportservice v. Monsour*, 59 So.2d 499 (La. App. 1952); *Gore v. Veith*, 156 So. 823 (La. App. 1934). Further, the Louisiana law is settled that its statutes of limitations are to be strictly construed and, if there are two possibly applicable statutes, the one which will permit the action will be

adopted over the one which would bar the action. *Foster v. Breaux*, 263 La. 1112, 270 So.2d 526 (1972); *United Carbon Co. v. Mississippi River Fuel Corp.*, 230 La. 709, 89 So.2d 209 (1956).

Plaintiff also contends that the one-year statute cannot constitutionally be applied in this case. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716 (1975), this Court noted at footnote 7 that the limited grant of certiorari in that case precluded this Court from considering whether a one-year statute of limitations in Tennessee could be constitutionally applied to a civil rights action. That issue is here presented to the Court. The Virginia federal courts have repeatedly held that the one-year Virginia statute of limitations cannot constitutionally be applied to § 1983 cases, as it would be violative of the supremacy clause (Article VI of the United States Constitution.) *Van Horn v. Lukhard*, 392 F.Supp. 384 (E.D. Va. 1975); *Brown v. Blake & Bane, Inc.*, 409 F.Supp. 1246 (E.D. Va. 1976); *Edgerton v. Puckett*, 391 F.Supp. 463 (W.D. Va. 1975). The imposition of a one-year statute of limitation unduly burdens the vindication of constitutionally protected rights and defeats the congressional purpose in enacting the statute.

Even if the one-year statute is applicable, this suit is still not barred by it because under decisions of the District of Columbia Circuit and the Fifth Circuit, as well as other district courts, the statute of limitations does not begin to run in cases involving discriminatory employment practices of a continuous nature until the employment relationship ceases or until the discriminatory practices have ended. *Macklin v. Spector Freight Systems, Inc., supra; United States v.*

Georgia Power Company, supra; Dudley v. Textron, Inc. Burkart-Randall Division, 386 F.Supp. 602 (E.D. Pa. 1975); *Jamison v. Olga Coal Co.*, 335 F.Supp. 454 (S.D.W.Va. 1971); *Mixson v. Southern Bell Telephone and Telegraph Co.*, 334 F.Supp. 525 (N.D. Ga. 1971). As will be pointed out below, the discriminatory practices in this case continued up to the time of plaintiff's retirement in May 1976 and even thereafter. The decision in this case, therefore, represents an extreme departure from existing jurisprudence.

At issue here also is whether this Court's decision in *Johnson v. Railway Express Agency, Inc., supra*, which held that non-judicial efforts to obtain relief from discriminatory employment practices did not toll the statute of limitations in a § 1981 suit, is to be applied retroactively or prospectively only. Prior to the *Johnson* decision, the Fifth Circuit, as other courts, recognized the doctrine of tolling in civil rights suits. *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), reversed and remanded on other grounds 424 U.S. 747, 96 S.Ct. 1251 (1976); *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rub. Pl.*, 491 F. 2d 1364 (5th Cir. 1974); *Boudreaux v. Baton Rouge Marine Contracting Co., supra; Taliaferro v. Dykstra*, 388 F.Supp. 957 (E.D. Va. 1975). Some lower courts have held that *Johnson* will not be applied retroactively but rather will be applied prospectively only. *Pittman v. Anaconda Wire & Cable Co.*, 408 F.Supp. 286 (E.D.N.C. 1976), and cases cited therein; *Freeman v. Motor Convoy, Inc.*, 409 F.Supp. 1100, 1114 (N.D. Ga. 1976). Under the principles established by this Court in *Chevron Oil Co., v. Huson, supra, Johnson* should not be applied retroactively to this case and yet it apparently was by the courts below.

If the one-year statute is applicable and if *Johnson* is not to be applied retroactively, the issue presented, an important one, is whether plaintiff's non-mandatory non-judicial efforts to obtain relief from the discriminatory employment practices tolled the statute of limitations. The plaintiff here filed suit only after first exhausting all other possible avenues of relief within the system. His restraint from suing should be commended by fasioning an appropriate doctrine of tolling and not penalized when so many people in our society rush to the courthouse upon the slightest provocation. Not only is the rule of the district court in this case, which was apparently approved of by the Court of Appeals, unworkable, but it is also burdensome to the courts and to society. The rule is unworkable because in many instances of discriminatory employment practices the victim cannot even be certain he has been victimized unless and until the discriminatory practices persist over a period of time. Further, the rule is burdensome in that it would require persons who suspect they have been victimized to file suit immediately within one year whenever their suspicions are aroused. This would culminate in litigation over many matters which can and should be adjusted amicably between the parties and should never be in court. Dr. Heyn attempted to do this, going all the way up to the Attorney General and Governor of the State of Louisiana to obtain relief without litigation. The penalty imposed upon him by the courts below for his efforts should not be tolerated. The purpose of the statute of limitations, repose of stale claims, if the one-year statute is to be applied in this case, will in no way be disturbed because the defendants were well aware of plaintiff's claims and grievances through his repeated protests to them and others about the very abusive treatment he was receiving as a result of his courage in voicing his opinions of the university's personnel practices.

2. *Summary Judgment*

It is absolutely impossible to justify the summary judgment granted by the district court and affirmed by the court of appeals. It was granted by the trial court because "there exists no allegation of wrongdoing on the part of defendants on or after July 31, 1972, and that all of the alleged violations of plaintiff's civil rights occurred well before July 31, 1972." The district court simply ignored all of the discriminatory employment practices which occurred after July 31, 1972:

(a) Defendants continued to pay plaintiff a salary substantially less than the average salary paid to other full professors;

(b) Plaintiff was assigned to teach five freshmen courses in the fall of 1972, four in the fall of 1973, and one in the fall of 1974;

(c) Plaintiff was assigned to teach three freshmen lab courses in the fall of 1973, and did not receive the customary assistance of graduate assistants provided to other professors;

(d) Plaintiff was not allowed to teach his course of specialization, cytology, in 1972, 1973, 1974, 1975, or 1976;

(e) Plaintiff continued to be discriminated against even through 1975 in that he was not reimbursed for his travel expenses for giving lectures or presenting papers as other faculty members were:

(f) Defendants kept the existence of the malicious, false and defamatory documents about plaintiff in his personnel file without his knowledge or opportunity to be heard and they are still maintained in his file today;

(g) Plaintiff never even discovered the existence of those false and defamatory documents until 1975;

(h) Other abusive accusations made by defendants against plaintiff and proven by plaintiff to be false are still maintained in his personnel files;

(i) Plaintiff's retirement benefits are lower today than they should be because of the prior retributions with regard to his salary;

(j) Defendants have discriminatorily refused to allow plaintiff during his retirement to use university facilities to continue his research even though all other emeritus professors who desire are allowed to do so.

These facts were before the district court and were at issue at the time of the decision below. The district court did not hold that there was no issue of fact, but rather that there were no allegations of wrongdoing after July 31, 1972. The district court's decision was totally and squarely wrong and completely unsupported by the record in this respect as was the Fifth Circuit's affirmance. The only explanation for the district court's decision is the trial judge's opinion as to the *merits* of the case which was formed without hearing any evidence. The trial judge expressed to counsel in conference that he thought that plaintiff's "problems" were simply the result of a "personality con-

flict." (Plaintiff thereafter moved for a trial by jury which was denied.) That is a completely improper basis upon which to grant summary judgment.

Even if the application of the one-year statute of limitations was correct, the grant of summary judgment was totally inappropriate and a completely unprecendented departure from established law with regard to the claims of discriminatory treatment after July 31, 1972, and requires the exercise of this Court's power of supervision.

3. *Amended Complaint*

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971), this Court stated:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Again, in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), this Court recognized that the liberty interest in reputation is to be afforded constitutional protection and that school administrators cannot make charges which may damage one's reputation without affording due process safeguards.

The false and malicious written accusations against the plaintiff, which were placed in his personnel file in 1966 and in 1967 and which were concealed from him but which were relied upon for sanctioning the conduct taken against him, were made the basis for the amended complaint when they were discovered during discovery in this action in

1975. Those accusations were part of the reprisals taken against plaintiff for the exercise of his freedom of speech and they also deprived plaintiff of due process of law as they were used to justify actions against him without his ever being afforded even notice of the charges, much less the opportunity to be heard. This, therefore, presents a classic case of due process violations. Yet the trial court, without discussion, dismissed plaintiff's motion for leave to file the amended complaint as moot. There is nothing whatsoever that was moot about those claims.

The district court dismissed those claims as moot when they were not and their dismissal cannot be justified even if the Louisiana one-year tort statute of limitations is applicable. The rule is well established in Louisiana that the statute does not even begin to run with respect to defamatory statements which are concealed from the plaintiff until after he learns about them. *Cartwright v. Chrysler Corp.*, 255 La. 598, 232 So.2d 285 (1970); *Bernstein v. Commercial National Bank*, 161 La. 38, 108 So. 117 (1926). See also *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582 (1946).

There was simply gross error of constitutional dimensions by the courts below in denying plaintiff the opportunity to vindicate his constitutional rights with respect to the matters claimed in the amended complaint.

CONCLUSION

The issues involved here are serious and important enough in the administration of civil rights claims to justify this Court's consideration of this case. Further, irreconcilable conflicts exist among the circuits and even in cases

within the same circuit as to the applicable statute of limitations. The conflict can be resolved only by the intervention and direction of this Court. Moreover, with respect to the granting of summary judgment and denying the amended complaint, the lower courts in this case have departed so far from established and accepted judicial proceedings that the exercise of this Court's power of supervision is entirely warranted.

Transcending these considerations is the fact that justice requires that Anton Heyn be allowed his day in court to vindicate the deprivation of his constitutional rights. This Court offers the very last opportunity for him to do that. The Court has before it in his case a distinguished and dedicated teacher who had the courage, when no one else did, to criticize what he considered to be the ruthless firing practices of the university. For having that courage and exercising his constitutional right, he fell from the graces of the demi-gods at the university and suffered the severest persecution. In addition to being denied the salary and other remuneration which he should have received, he was villified and abused in every way possible. The most reprehensible action taken against him was the vicious maligning of his good name and reputation which was done in secret conspiracy behind his back without his knowledge and without affording him any opportunity to refute the false accusations. He sought relief in every way possible through the system and even obtained a meager measure of relief. It was only after he had exhausted his non-judicial avenues that he sought relief in court, but the door to the court has been slammed in his face and locked tightly. This is a classic free speech and due process case but plaintiff has been told, unlike others, that he waited too long, even

though the persecution continued. This Court must intervene to avoid the mockery of justice which has occurred in this case.

Respectfully submitted,

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COUNSEL FOR PETITIONER

September 1, 1977.

PROOF OF SERVICE

I, ROBERT EDWARD BARKLEY, JR., Attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of September, 1977, I served three (3) copies of the Petition for a Writ of Certiorari in the above-captioned case on Respondents, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Homer L. Hitt; George C. Branam; William B. Good; and Manuel L. Ibanez, by depositing such three copies in the United States Postal Service, first class postage prepaid, in a sealed envelope addressed to Counsel for Respondents: Rutledge C. Clement, Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, Louisiana 70112.

It is further certified that all parties required to be served have been served.

This is the 1st day of September, 1977, at New Orleans, Louisiana.

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APPENDIX A - Order of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: March 12, 1976

ANTON N. J. HEYN	CIVIL ACTION
VERSUS	NO. 73-2027
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET ALS	SECTION "H"

ORDER

The plaintiff in the present case has brought actions under 42 U.S.C. § 1983 and §1985(3), alleging discrimination, harassment, abuse, intimidation, reprisals, and systematic professional indignities on the part of the defendants against plaintiff, allegedly as a result of the plaintiff's exercising his constitutionally protected right of freedom of speech.

I. MOTION TO DISMISS

The defendants have filed a motion to dismiss both the § 1983 claim, in regard to all aspects of the suit previous to July 31, 1972, and the § 1975(3) [sic] claim.

For reasons which will follow the motion of defendants to dismiss the plaintiff's § 1983 claim, in regard to all

aspects of the suit previous to July 31, 1972 and the plaintiff's § 1985(3) claim is hereby GRANTED.

II. MOTION FOR SUMMARY JUDGMENT

The defendants' motion for summary judgment in regard to all aspects of the plaintiff's claim under § 1983, beginning July 31, 1972 and ending July 31, 1973, is hereby GRANTED. Reasons will follow.

III. MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND MOTION FOR TRIAL BY JURY

In light of the above rulings, the motion for leave to file amended complaint and the motion for trial by jury are DISMISSED AS MOOT.

New Orleans, Louisiana, this 11th day of March, 1976.

s/ R. Blake West
United States District Judge

APPENDIX B - Memorandum and Order of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: June 7, 1976

ANTON N. J. HEYN	CIVIL ACTION
VERSUS	NO. 73-2027
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET ALS.	SECTION "H"

MEMORANDUM AND ORDER

In this matter, the plaintiff, a professor of biology at the University of New Orleans, brought suit based upon 42 U.S.C. §1983 and 1985(3).

On March 11, 1976, the Court issued a judgment granting defendants' motions to dismiss and for summary judgment. The motions were granted for the following reasons:

I. *§1983 Cause of Action*

Because the defendants brought both a motion to dismiss and a motion for summary judgment as to the plaintiff's §1983 claim, it is necessary to discuss each motion separately.

A. *Motion to dismiss §1983 claim*

The defendants sought to dismiss all claims alleged to have occurred prior to July 31, 1972 on the ground that such claims had prescribed. Because §1983 makes no provision for a limitation period, the Court must apply the statute of limitations which governs the most analogous claim under appropriate state law. *Scott v. Vandiver*, 476 F.2d 238 (C. 4, 1973); *Waters v. Wisconsin Steel Works of International Harvester*, 427 F.2d 476 (C. 7, 1970); *Smith v. Olincraft*, 404 F.Supp. 861 (W.D. La., 1975). Plaintiff argues that there is no analogous statute under state law, and therefore the general statute of limitation of ten years, provided by Louisiana Civil Code Article 3544 (1870), is applicable.

Defendants, on the other hand, contend that plaintiff's action sounds in tort and that the one-year prescriptive period of Civil Code Articles 2315 and 3536 (1870) applies.

The fact that " §1983 should be read against the background of tort liability" has been recently restated by the Fifth Circuit in *Bryan v. Jones*, 519 F.2d 44, 45 (C. 5, 1975), and is well established law. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961).

A careful review of the facts in the present case, as summarized by plaintiff in Paragraph 8, page 4, of the final pretrial order[1], makes it clear that plaintiff sought damages

1. "(8) Immediately following, and as a result of, the above exercises of plaintiff's constitutionally protected freedom of speech, plaintiff began to experience harrassment, intimidation, abuse, oppression, systematic professional indignities, reprisals, invidious discrimination,

for violation of his civil rights. Plaintiff did not file a claim under § 1981, which is the section of the Civil Rights Act which affords protection of contractual rights. Plaintiff's claim sounds in tort, and his contention that his civil rights were violated by a breach of any contractual rights is without merit.

Plaintiff's First Amendment rights are in no way dependent upon the existence of any rights he may possess as a result of breach of his contractual relationship with the defendants. This simple distinction was drawn in *Holden v. Boston Housing Authority*, 400 F.Supp. 399 (D. Mass., 1975), wherein the Court held:

> "If the plaintiff seeks to enforce rights under the First Amendment against deprivations by state officials, he would have that claim regardless of his contractual relationship with those officials or the agency for which they work." Id. at 402.

The fact that a contractual relationship existed between plaintiff and defendants is only incidental; the alleged violation of plaintiff's civil rights is no more or less serious because of it. The alleged wrongful acts occurred and the

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(Footnote 1 continued from previous page)

and numerous unfounded charges. Such treatment was initiated by Jack Carlton and was continued by Manuel Ibanez, who replaced plaintiff as Chairman of the Department. Defendants Good, Branan and Hitt were aware of the actions taken against plaintiff and in numerous instances approved such conduct and in all instances acquiesced therein and condoned same. The defendant Board of Supervisors was also aware of many of the actions taken against plaintiff but did nothing to correct them."

alleged injurious words were spoken before July 31, 1972.[2]

Furthermore, plaintiff's claim that he is entitled to back pay, asserted under the Civil Rights Act, sounds in tort, not in contract. *Watkins v. Scott Paper Co.*, F.2d. (C.5, 1976).

For the foregoing reasons, the Court concluded that the elements of plaintiff's claim which was based on events which occurred prior to one year before this suit was filed were barred by the one year statute of limitations of Articles 2315 and 3536. Accordingly, all aspects of the suit dealing with events which occurred prior to July 31, 1972 were dismissed with prejudice.

B. *Motion for Summary Judgment*

Defendants' motion to dismiss the cause of action under §1983 for claims which accrued prior to July 31, 1972 having been granted, the only remaining §1983 claim the plaintiff has is for events which allegedly occurred during the period beginning July 31, 1972, and ending July 31, 1973. A thorough review of the record reveals that, as defendants contend, there exists no allegation of wrong-doing on the part of defendants on or after July 31, 1972[3] , and that all of the alleged violations of plaintiff's civil rights occurred well before July 31, 1972. The fact that actions on the part of defendants (i.e., the wrongful denial of promotion) were allegedly still causing plaintiff injury after July 31, 1972 is not relevant to a determination of the date

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2. See plaintiff's deposition of April 25, 1975, particularly pgs. 19, 21, 23, 26, 37, 62, 73, 87, 114, 121, and 133.

3. See (1) plaintiff's original complaint, (2) plaintiff's note of evidence, and (3) the final pre-trial order.

on which the one-year limitation period began to run. Prescription began to run from the date the alleged act which caused the alleged injury took place. Plaintiff himself admits that he had been planning to bring this suit for over 10 years.[4] Indeed, if it were otherwise, once injured, a plaintiff's suit would never prescribe.

Hence, in the absence of any genuine issue as to any material fact, the defendants' motion for summary judgment was granted in regard to any remaining claims the plaintiff asserted under §1983.

II. *§ 1985 (3) Cause of Action*

Plaintiff has asserted a claim under 42 U.S.C. § 1985 (3), which was enacted by Congress in 1871 as the enforcement vehicle for the 13th Amendment. The original intent of the Congress in passing the Act, then commonly known as the Ku Klux Klan Act, was to provide to black persons equal protection of the laws of the United States and to rectify pre-existing moral and physical inhumanities. The legislative intent is clearly evident from the terms of the statute itself, which states:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

4. See p. 88, plaintiff's deposition of April 25, 2975, wherein plaintiff, when questioned about bringing suit, stated:

"I have waited a long time, ten years, to decide to do it, when all the channels were exhausted.

> under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States, or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The United States Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed. 2d 338 (1971), formulated four elements necessary to establish a cause of action under §1985(3). These elements are:

1. A conspiracy by the defendants,

2. With a purpose of depriving the plaintiff of equal protection of the law or equal privileges

or immunities under the law,

3. A purposeful intent to discriminate, i.e., there must be some racial or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action, and

4. Injury to the person or property of the plaintiff or his deprivation of a right or privilege as a citizen of the United States resulting from actions in the furtherance of the conspiracy.

See also, *Jacobson v. Industrial Foundation of the Permian Basin*, 456 F.2d 258 (C.5, 1972); *Kletsunka v. Driver*, 411 F.2d 436, 447 (C.2, 1969).

Plaintiff asserts that he is a member of a class of university professors who were discriminated against in the exercise of their First Amendment privileges, and, therefore, that § 1985(3) should apply. The Court does not agree. The mere allegation that Professor Heyn was discriminated against does not of itself make § 1985(3) applicable. The courts have consistently "[r]ejected complaints containing mere conclusory allegations of deprivations of constitutional rights protected under § 1985(3). A conspiracy claim based upon § 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination. . . " *Robinson v. McCorkle*, 462 F.2d 111, 113 (C. 3, 1972); see also *Byrd v. Local Union #24, IBEW*, 375 F.Supp. 545, 552 (D.Md., 1974). Furthermore, the requisite invidiously discriminatory intent must be shown to be class-based. *O'Neill v. Grayson County War Memorial Hospital*, 472 F.2d 140, (C.6, 1973).

As the Fifth Circuit succinctly stated in *Westberry v. Ginan Paper Company*, 507 F.2d 206, 210 (C.5, 1975; reh. en banc granted, March 18,1975); opinion withdrawn, May 23, 1975 (based on mootness):

> "Plaintiff's 1985(3) action cannot be sustained under the Griffin Court's Thirteenth Amendment rationale. The aim of the amendment is to provide protection for racial groups which have historically been oppressed, Jones v. Mayer, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 or those chafing under the hands of involuntary servitude. Clyatt v. United States, 1905, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726. Plaintiff is neither in a racially oppressed group nor serving involuntarily."

See also *Dombrowski v. Dowling*, 459 F.2d 190, 196 (C.7, 1972); *Jones v. Bales*, 58 F.R.D. 453, 457-58 (N.D. Ga., 1972), aff'd 480 F.2d 805 (C.5, 1973); *Furumoto v. Lyman*, 362 F.Supp. 1267 (N.D.Cal., 1973).

The Civil Rights Act of 1871 was not designed to furnish relief for every injury.[5] As stated, plaintiff has failed to demonstrate the class-based animus necessary to maintain this action. Additionally, plaintiff has failed to establish a class which is a proper recipient of the protections conferred by 42 U.S.C. § 1985. He is neither a member of a racially oppressed group, nor is he a member of a group serving involuntarily. For this reason, the plaintiff has failed to state a claim under 42 U.S.C. § 1985 (3).

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5. There can be no doubt that personal dislike is a strong factor in this case, but personal dislike is insufficient to permit recovery under § 1985(3).

III. JUDGMENT

Therefore, IT IS HEREBY ORDERED that judgment be entered accordingly.

New Orleans, Louisiana, this 4th day of June, 1976.

s/ R. Blake West
UNITED STATES DISTRICT
JUDGE

APPENDIX C - Judgment of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: June 16, 1976

ANTON N. J. HEYN, Plaintiff — CIVIL ACTION

VERSUS — NO. 73-2027

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, HOMER L. HITT, GEORGE C. BRANAM, WILLIAM B. GOOD, and MANUEL L. IBANEZ, Defendants — SECTION "H"

JUDGMENT

On Motions of defendants, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Homer L. Hitt, George C. Branam, William B. Good, and Manuel L.Ibanez, to dismiss and, alternatively, for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of defendants, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Homer L. Hitt, George C. Branam, William B. Good, and Manuel L. Ibanez, and against plaintiff, Anton N. J. Heyn, dismissing with prejudice plain-

tiff's action on the merits, each party to bear their own costs.

New Orleans, Louisiana, this 16th day of June, 1976.

s/ Nelson B. Jones
CLERK OF COURT

APPROVED AS TO FORM:

S/ R. Blake West
UNITED STATES DISTRICT JUDGE

Date of Entry June 16, 1976

APPENDIX D - Memorandum and Order of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: July 27, 1976

ANTON N. J. HEYN	CIVIL ACTION
VERSUS	NO. 73-2027
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET ALS	SECTION "H"

MEMORANDUM AND ORDER

Plaintiff filed suit in July, 1973, alleging certain violations by Defendants of his civil rights under Title 42 United States Code Sections 1983 and 1985(3). Defendants filed motions to dismiss and for summary judgment, which motions were argued, taken under advisement, and finally granted. On June, 1976 a judgment dismissing Plaintiff's action was entered. Subsequently, Plaintiff filed a motion to reconsider, alter, amend, vacate, and satisfy judgment. This motion was argued July 7, 1976 and taken under advisement.

After having carefully reviewed the extensive memoranda submitted by the parties, it is the opinion of the Court that, for the following reasons, the motions should be denied.

Plaintiff's motion challenges the granting of Defendants' motion for summary judgment, and the granting of the motion to dismiss the Section 1983 claim. Plaintiff does not attack the dismissal of his Section 1985(3) claim.

Plaintiff's underlying contentions are two-fold. First, Plaintiff argues that the so-called "catch all" statute of limitations [1] should be applied, as opposed to the statute of limitations Louisiana courts have applied to delictual claims; secondly, Plaintiff argues that, if his claim does indeed sound in tort, the actions taken by Defendants span a period of ten years, and because Defendants have persisted in their course of wrongful action during that time and to the present [2], the "tort" is continuous in nature and therefore the cause of action has not prescribed. However, Plaintiff has cited no authority supportive of his contentions which was not previously argued to the Court on the motions to dismiss and for summary judgment. Recent decisions by the United States Supreme Court [3] and the United States Court of Appeals for the Fifth Circuit [4] lend further support to the Court's position. The motion for a new trial is, therefore, DENIED.

New Orleans, Louisiana, this 26th day of July, 1976.

s/ R. Blake West
UNITED STATES DISTRICT
JUDGE

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1. La. Civil Code Art. 3356.

2. Although it is doubtful whether actions of the defendants which took place subsequent to the filing of this suit are relevant, the question is mooted by the Court's decision.

3. *Imbler v. Pachtman*, 44 U.S.L.W. 4250; *Bishop v. Wood*, 44 U.S.L.W. 4820.

4. *Watkins v. Scott Paper Company*, 530 F.2d 1159 (C. 5, 1976).

APPENDIX E - Opinion of the United States Court of Appeals for the Fifth Circuit affirming the decisions of the United States District Court for the Eastern District of Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76 - 3488
Summary Calendar*

ANTON N. J. HEYN,

Plaintiff-Appellant

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE; HOMER L. HITT; GEORGE C. BRANAM; WILLIAM B. GOOD; and MANUEL L. IBANEZ

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana

(March 31, 1977)

BEFORE GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409 Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-344

ANTON N. J. HEYN,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, HOMER L. HITT, GEORGE C. BRANAM, WILLIAM B. GOOD, and MANUEL L. IBANEZ,

Respondents

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77 - 344

ANTON N. J. HEYN,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, HOMER L. HITT, GEORGE C. BRANAM, WILLIAM B. GOOD, and MANUEL L. IBANEZ

Respondents

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

I. With respect to claims brought under Title 42 U.S.C. Section 1983 for an alleged intentional and tortious violation of civil rights and filed in a Federal Court sitting in Louisiana, is not the Louisiana one-year statute of limitations for torts applicable?

A. Does the Supremacy Clause affect the determination that the Louisiana one-year statute of limitations for torts is applicable and controlling in a 42 U.S.C. § 1983 suit filed in a Federal Court sitting in Louisiana?

B. Is administrative action or the allegation of a continuous tort sufficient to toll the Louisiana one-year statute of limitations for torts and civil rights actions brought pursuant to Title 42 U.S.C. § 1983?

II. Did not the Trial Court act within its discretion in dismissing as moot petitioner's untimely motion for leave to file an Amended Complaint for alleged defamation after the Final Pretrial Conference and in view of the propriety of defendants' motions for dismissal and for summary judgment?

III. Did not the Trial Court properly grant summary judgment with respect to all alleged civil rights violations which occurred during or after the one-year period immediately prior to the filing of the original Complaint in that petitioner failed to demonstrate an unconstitutional abridgment of a protected liberty or property interest under the Fourteenth Amendment?

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.Code, Section 1983 provides:

"Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of

law, suit in equity, or other proper proceeding for redress."

Louisiana Civil Code, Article 3536, provides in pertinent part:

"The following actions are also prescribed by one year:

* * * * *

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

STATEMENT OF THE CASE

There is no special or significant reason why certiorari should be granted herein. This civil rights suit, brought pursuant to 42 U.S.C. § 1983, was filed on July 30, 1973, by a 71-year old (his present age), white-male protestant, who was (prior to retirement in May of 1976) a tenured full professor in the Department of Biology at the University of New Orleans (an integral part of the Louisiana State University System), against University officials who continuously from 1964 made every effort to accommodate and work with him. The suit was *not* filed as a class action and it was *not* filed pursuant to Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C. § 2000-e 5,*et seq*.

Since retirment, petitioner Heyn has had absolutely no relationship with U.N.O., except for the purely honorary title of Professor Emeritus. In addition to the present litigation, petitioner currently is the plaintiff in a state court def-

amation action which he filed against the University and various officials in March, 1976, in Civil District Court, Parish of Orleans, State of Louisiana, requesting trial by jury.

The presence of state action is not disputed, with the basic controversy being the correct statute of limitations to be applied in cases such as this. The other fundamental issue is whether the treatment received by plaintiff from defendants was of constitutional magnitude, *i.e.*, was Professor Heyn at any time deprived of a constitutionally protected liberty or property interest. The two lower federal courts, consisting of one District Judge and three Circuit Judges, have unanimously held that this case is governed by a one-year limitations period and that, moreover, the non-prescribed portion of the petitioner's claim could not withstand a motion for summary judgment. *Heyn v. Board of Supervisors of L.S.U.*, 417 F.Supp. 603 (E.D. La. 1976), *aff'd mem.*, 550 F.2d 1282 (5th Cir. 1977), *rehearing denied*, 553 F.2d 100 (5th Cir. 1977).

FACTUAL BACKGROUND

Petitioner, Professor Heyn, arrived at Louisiana State University in New Orleans (now the University of New Orleans), in the fall of 1963, whereupon he commenced his duties as full Professor of Biology and Chairman of the Department of Biology. Prior to arrival at U.N.O., petitioner taught at various educational institutions after immigrating to this country from the Netherlands in 1948. (R. 421). After one year at U.N.O., Professor Heyn, in accordance with a pre-employment agreement,was given academic tenure, meaning that he could not be terminated except for cause. Thus, Heyn remained at U.N.O. until his retire-

ment at age 70, in May of 1976, although he ceased to be a departmental chairman after 1965. It is undisputed that soon after acquiring full tenure rights, Professor Heyn on numerous occasions, if not constantly, found fault with those around him.

The record is replete with instances of friction between Heyn and his superiors (Dean Carlton, who hired Heyn, was the first; thereafter, Drs. Hitt, Branam, Ibanez, and Laseter), contemporaries (Drs. Dundee, Bryan and Ibanez), and subordinates (such as secretaries, graduate students, and undergraduate students). (R. 423, pp. 27-28; R. 483, pp. 45-57; R. 599, p. 141, pp. 244-245; R. 685 [footnote 5]). Similarly, the documents in the record portray an unending effort by the U.N.O. administration to accommodate the desires of this faculty member, numerous instances of good faith attempts to effect amicable resolutions and viable solutions to the problems that continually arose between Heyn and respondents, as well as between Heyn and other members of the faculty, administration, business department, and student body. See, *e.g.*, R. 421 (Heyn Depo. Exhibits 5-17). Painstaking and patient efforts were expended to insure that Dr. Heyn received even-handed and impartial treatment and no showing of arbitrariness appears in the record. (R. 295-394, R. 423, R. 483, R. 599, R. 259, R. 254, R. 671-673.)

Throughout the more than four years of this litigation, respondents have conceded that petitioner was a teacher and researcher of arguably average competence. At best, his performance, participation and contribution to U.N.O. have likewise been average. (R. 421, Exs. 5-17; R. 423, pp. 175-177; R. 483, pp. 65-66, 90-91, 149-154; R. 599, pp. 128-130, 157-158; and Hitt Depo. [Part II], pp. 18-19).

Needless to say, had the administrators formed the firm opinion that Heyn was incompetent, then they would have been derelict in the performance of their duties for not taking action to protect the University, an instrumentality of the State, by stripping Heyn of his tenure and discharging him; such action was never taken.

As Professor Heyn has unambiguously stated, the respondents have *never* made or brought public charges against him concerning his professional or private conduct. (R. 421, Heyn Deposition at pp. 100-101.) All personnel actions taken by respondents (as well as by Dean Carlton and Dr. Laseter, neither of whom were named as defendants) with respect to Heyn were the result of earnest deliberations and subjective value judgments made within their sound administrative discretion; *e.g.*, courses assigned, class schedules, salary adjustments, and professional and clerical assistance. This discretion is granted to respondents by law and regulation. (R. 599, pp. 58-59, and Hitt Depo. [Part II], p. 54 and pp. 68-69.) There are no facts to support the contention that Heyn was ever treated capriciously, frivolously, arbitrarily, or maliciously. For example, consider R. 254, pp. 197-198; R. 428, pp. 251-252; R. 599, p. 108, p. 131, R. 295-394, and Hitt Depo. (Part II), pp. 70-71.

All decisions regarding Heyn's compensation as a faculty member were made with due regard for the limited availability of funds and the relative merits of others deserving of salary increases. See, *e.g.*, R. 423 (Branam Depo.) pp. 159-162. As stated in the U.N.O. Faculty Handbook, page 25 (Heyn Depo. Ex. 3, R. 421), discussed in Professor Heyn's Deposition at pp. 29-30 (R. 421), with respect to salaries and salary adjustments, the University policy is as follows:

> "The University does not operate on a fixed salary scale. Salaries are reviewed annually and adjustments recommended within the framework of available funds .... Increases in salary may result from promotion in rank, from general raises throughout the University, or from recognition of individual merit."

Also of importance is the University policy on merit increases in compensation as stated in the widely promulgated U.N.O. Faculty Handbook (R. 421, Ex. 3):

> "Merit increases are recommended by the deans after consultation with their department chairmen. They are allocated in recognition of distinguished attainment and service. Seniority is considered, but it is never of itself a factor in the absence of other claims. The attempt is made to evaluate each individual in terms of his own ability and scholarly contribution, or in terms of his creative and artistic contributions, rather than in terms of the renown of his degree-granting institution. Scholarly publications as well as participation in scholarly meetings and association activities are certainly major factors in salary determinations, as are the evaluations by the dean and chairman of a faculty member's teaching performance, his contribution to committee work, and other services to the department, college, and university."

Since being employed at U.N.O. in 1963, Professor Heyn's annual salary for each of the thirteen (13) ensuing academic years has been as follows (R. 423, Branam Depo. pp. 180-184):

(a) 1963-1964 (Heyn's First Year at U.N.O.)	$10,000.00
(b) 1964-1965	11,800.00
(c) 1965-1966	11,800.00
(d) 1966-1967	11,800.00
(e) 1967-1968	12,000.00
(f) 1968-1969	12,000.00
(g) 1969-1970	12,350.00
(h) 1970-1971	13,585.00
(i) 1971-1972	14,943.00
(j) 1972-1973	16,437.00
(k) 1973-1974	17,658.00
(l) 1974-1975	18,541.00
(m) 1975-1976 (Terminal Year)...	18,900.00

In his thirteen years as a U.N.O. faculty member, the petitioner realized nine salary increases to the extent that his compensation almost doubled. In no instance was there a decrease in the amount of real income received by Dr. Heyn. It is worth noting that prior to approximately 1970, the annual rate of inflation was considerably less than in the

post-1970 period. Dr. Heyn asserts on the one hand that he is a world-famous teacher and researcher, and that U.N.O. was truly fortunate to have such a tenured faculty member; on the other hand, he does not explain why, as such a renown personage, he accepted a position in 1963 paying $10,000.00 per year and why he remained for the closing thirteen years of his professional career despite the fact that, according to him, he was never appreciated or given the preferential treatment that he sought.

The *liberty* interest claimed by Heyn to have been abridged concerns the constitutional guarantee of freedom of expression. There is *no* claim of an infringement of a protected *property* interest. This First Amendment abridgment was alleged relative to an internal University controversy concerning whether U.N.O. should remain a part of the statewide L.S.U. System and whether the University's name should be changed from "L.S.U.N.O." to "U.N.O." even though there was no breaking away from the L.S.U. System. In fact U.N.O. has remained an integral part of the State's System, but the name change did occur.

Despite a prolonged and expensive discovery program, the petitioner was singularly unsuccessful in substantiating his conclusory and conjectural allegations to the effect that because he favored U.N.O.'s remaining in the L.S.U. System he was victimized. In fact, as discovery progressed it became crystal clear that the respondents were extremely vocal in supporting the contention that U.N.O. remain within the L.S.U. System. This was the same side of the argument taken by petitioner Heyn. The change of name from L.S.U.N.O. to U.N.O. was a change that had no substantive bearing on the structure of U.N.O. or its relationship to the

state-wide System. The important point is that the respondents, Hitt, Branam, Good, and Ibanez, were in *agreement* with Heyn on this issue of separation from the L.S.U. System, and thus the claim of discrimination because of the free exercise of First Amendment rights was never substantiated in the Court below.

Moreover, as the Trial Court held, the claims of discrimination for the period of over one year prior to the filing of suit were and are barred by the statute of limitations. Clearly, Heyn was unable to seriously allege discrimination in the applicable time period (July 31, 1972, through July 30, 1973) and this is further illustrated by his failure to name as a defendant Dr. John Laseter, the Chairman of the Department of Biology since 1970. It is conceded that it is the Department Chairman who determines course schedules and has the major impact on salaries and salary adjustments. Nevertheless, Laseter was not made a party and, therefore, it is difficult to understand how Heyn can seriously allege discrimination in the post-July 1972 period (*i.e.*, one year prior to filing suit).

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

I. *Statute of Limitations*

The District Court and the Fifth Circuit have conscientiously and correctly followed the directions of this Court in applying the one-year prescriptive period of Louisiana Civil Code, Article 3536, to the claims brought by petitioner Heyn under the Civil Rights Act of 1871 (Ku Klux Klan Act), 42 U.S.C. § 1983, enacted pursuant to the Fourteenth

Amendment to the Federal Constitution. Both *Pierson v. Ray*, 386 U.S. 547, 555-56 (1967), and *Monroe v. Pape*, 365 U.S. 167, 187 (1961), teach that " § 1983 [should] be read against the background of tort liability." *Whirl v. Kern*, 407 F.2d 781, 791 (5th Cir.), *cert denied*, 396 U.S. 901 (1969); *Bryan v. Jones*, 519 F.2d 44, 45 (5th Cir. 1975). Likewise, this Court has expressly directed that federal courts adjudicating cases filed under § 1983 should look to and follow the analogous statute of limitations applied by the forum state in similar matters. *O'Sullivan v. Felix*, 233 U.S. 318 (1914).

On this very issue the Fifth Circuit Court of Appeals has in the past year decided three cases, in addition to *Heyn*, that specify the application of the Louisiana prescriptive period for *torts* in civil rights actions arising under either 42 U.S.C. § 1981 or § 1983. *Page v. U.S. Industries, Inc.*, 556 F 2d 346, 352 (5th Cir. 1977); *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1263 (5th Cir. 1977); *Kissinger v. Foti*, 544 F.2d 1257, 1258 (5th Cir. 1977); see also *Mouriz v. Avondale Shipyards,Inc.*, 428 F.Supp. 1025, 1026 (E.D. La. 1977); *Williams v. United States*, 353 F. Supp. 1226, 1230 (E.D. La. 1973); *Smith v. Olinkraft, Inc.*, 404 F.Supp. 861 (W.D. La. 1975).

The position of the Fifth Circuit is now crystal clear and it should be noted that neither *Page* nor *Ingram*, the definitive decisions, were cited in Professor Heyn's Petition for Certiorari. Instead, petitioner has continued to rely (see, *e.g.*, page 16 of the Petition by Dr. Heyn) on the rejected rationale of *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017, n.16 (5th Cir. 1971), and *Lazard v. Boeing Co.*, 322 F.Supp. 343 (E.D. La. 1971). As the Court of Appeals for the Fifth Circuit held in *Page v. U.S.*

Industries, Inc., supra, 556 F.2d at 352 n. 6:

> "We recognize that dicta in *Boudreaux v. Baton Rouge Marine Contracting Co.,* 437 F.2d 1011 (5th Cir. 1971), suggested that section 1981 claims are contractual and governed by the ten-year prescriptive period. 437 F.2d at 1017 n. 16. But we are not bound by dicta, and we have recently *rejected* these in favor of the analysis we employ here. *See Ingram v. Steven Robert Corp.,* 547 F.2d 1260, 1263 (5th Cir. 1977)."

Using a tort analytical approach, as mandated by the Supreme Court and the Fifth Circuit, it is beyond doubt that the District Court (as affirmed by the Fifth Circuit) acted properly in dismissing, pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure, all of Heyn's Complaint that preceded the one-year statute of limitations. Recently, Mr. Justice Powell again stated the settled rule that Title 42 U.S.C. § 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976). Similarly, the Fifth Circuit observed in *Watkins v. Scott Paper Co.,* 530 F.2d 1159, 1197 (5th Cir. 1976), that a plaintiff's civil rights claim for back pay "sounds in tort, not in contract." *Heyn, supra,* 417 F. Supp. at 605.

In his deposition, Dr. Heyn candidly admitted that he had been waiting for ten years to bring this lawsuit. Heyn Depo. at p. 88 (R. 421). As the petitioner stated: "I have waited a long time, ten years, to decide to do it, when all the channels were exhausted." *Heyn, supra,* 417 F.Supp. at 606 n. 4. To circumvent this obvious problem of staleness,

petitioner now argues that a ten-year statute of limitations (Louisiana Civil Code, Article 3544) should be adopted for §1983 actions filed in federal courts sitting in Louisiana. Such an argument is without merit in law as well as in fact when it is recalled that petitioner's original Complaint characterized his alleged injury as follows: false accusations, harassment, intimidation, professional indignities, invidious discrimination, abuse, oppression, numerous unfounded charges, interference with scientific equipment, unfair teaching assignments, unfair teaching schedules, interference with sabbatical leave privileges, and so forth, all of which occurred prior to 1972; *i.e.,* over one year prior to the institution of suit. Such claims are indistinguishable from traditional intentional tortious theories of action under Louisiana Civil Code, Article 2315, which always activate the Louisiana one-year statute of limitations found at Louisiana Civil Code, Article 3536.

In view of the recent Fifth Circuit decisions of *Page, supra,* and *Ingram, supra,* it cannot be said that a conflict exists either within the Fifth Circuit or generally between the Circuits. While the statute of limitations for a 1983 action may vary from state to state depending on the forum state's prescriptive period for delictual offenses, the crucial element is the fact that the approach does not vary and thus the Circuits do not differ on a substantial question of law.

I.A. *The Supremacy Clause and the Louisiana One-Year Statute of Limitations for Section 1983 Claims.*

Petitioner Heyn has for the first time in his application for certiorari raised the issue that the Louisiana one-year statute of limitations for all "offenses and quasi offenses"

(i.e., torts) is somehow violative of the Supremacy Clause of the United States Constitution, Article VI, Clause 2. The only support offered for this contention is three federal district court opinions arising from the State of Virginia. A review of those decisions, *Brown v. Blake & Bane, Inc.*, 409 F.Supp 1246 (E.D. Va. 1976); *Edgerton v. Puckett*, 391 F.Supp. 463 (W.D. Va. 1975); *Van Horn v. Lukhard*, 392 F.Supp. 384 (E.D. Va. 1975), reveals, however, an obvious distinction. While the Virginia statute of limitations for torts is generally two years, the Virginia General Assembly enacted a special one-year statute of limitations for civil rights actions. Such an arbitrary classification was accordingly ruled unconstitutional because it "unreasonably discriminates against the maintenance of § 1983, 'constitutional tort' actions." *Van Horn, supra*, 392 F. Supp. at 388.

In Louisiana, on the other hand, the same one-year statute of limitations is applied evenly to all tortious causes of action. Thus, until Congress legislates a uniform prescriptive period for 42 U.S.C. §1983, a problem of constitutional magnitude does not arise so long as the forum state does not assign to civil rights suits a limitations period which is distinctly different from the limitations period assigned to other tortious offenses. For the foregoing reasons, petitioner's assignment of error under the Supremacy Clause is without merit.

I.B. *Commencement of the Statute of Limitations for a Section 1983 Cause of Action*

Petitioner argues that because he complained continuously and to numerous people from 1963 until 1976 about the terms and conditions of his employment as a

tenured member of the U.N.O. faculty, he somehow stopped the statute of limitations from running during that period. This is another unsupported, novel theory being advanced by the petitioner-professor. The argument is patently meritless. No authority is known to exist whereby a prescriptive period can be tolled because the complainant wrote grievance letters to the State Governor, State Attorney General, State Board of Regents, L.S.U. Board of Supervisors, U.N.O. Chancellor, Vice Chancellor, Dean, Department Chairmen, and the American Association of University Professors. To accede to such a theory would emasculate statutes of limitations.

Recently, the United States Supreme Court, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), discredited the notion that filing a timely charge of employment discrimination with the Equal Employment Opportunity Commission would interrupt and toll prescription as to an independent claim of discrimination under 42 U. S. C. § 1981, notwithstanding the same factual basis for the two actions.

Likewise, this Court even more recently in *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 50 L.Ed. 2d 427 (1976), held that a timely filed union grievance would not serve to lengthen the 180-day period within which charges of employment discrimination must be filed with the E.E.O.C. following the alleged act of discrimination. In other words, an employee who exercises his rights under a collective bargaining agreement cannot thereby expect the limitations period for bringing a discrimination charge against the employer to be extended until the union proceeding is concluded. Such a conclusion is necessary and logical and a contrary rule would

vitiate the salutary policy of the doctrine of repose designed to protect defendants. This case is not even roughly analogous to *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428(1965), in that petitioner Heyn was never "prevented from asserting" his rights. In fact, by his own testimony, Professor Heyn made a conscious decision to wait ten years prior to filing suit. Heyn Dep. p. 87 (R. 421). Accordingly, there can be no equitable tolling of the one-year prescriptive period. It is submitted that the rationale of *Johnson* and *Robbins & Myers* is directly applicable to Professor Heyn's case and that the non-mandatory actions (a prolonged letter-writing campaign) taken by Dr. Heyn had no bearing whatsoever on the one-year statute of limitations which governs all of the claims in this litigation.

In *R.J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776, 781 (5th Cir. 1963), Judge Wisdom discussed the issue and laid to rest the contention that petitioner may go beyond the statute of limitations to recover damages on the theory of a continuing injury. Furthermore, *Hudson* held: "'*[i]t is only when one does not know that he has suffered an actionable injury that the statute is tolled.*' " 314 F.2d at 781 (emphasis in original), quoting from *McLaughlin v. Western Union Telegraph Co.*, 17 F.2d 574 (5th Cir. 1927).

As the District Court stated, when faced with this novel argument by Heyn:

> The fact that actions on the part of Defendants (i.e., the wrongful denial of promotion) were allegedly still causing Plaintiff injury after July 31, 1972 is not relevant to a determination of the date on which the one-year limitation period began to run. Prescription began to run from the date the alleged act which caused the alleged injury took place. Plaintiff admits that he had been planning to bring this suit for over ten years. *Indeed if it were otherwise, once injured, a plaintiff's suit would never prescribe.*

417 F.Supp. at 605-06 (emphasis added).

II. *Petitioner's Untimely Attempt to Amend the Complaint*

A review of the Record will reveal the following chronology of events in this litigation in the Trial Court:

(1) July 31, 1973: Complaint Filed.

(2) September 20, 1973: Answer Filed on Behalf of All Defendants.

(3) May 27, 1975: Original Pretrial Conference Date (Continued).

(4) June 16, 1975: Original Trial Date (Continued).

(5) October 24, 1975: Final Pretrial Order Was Submitted.

(6) October 28, 1975: Final Pretrial Conference Was Held.

(7) November 12, 1975: Plaintiff Filed a Motion to Amend His Complaint.

(8) December 15, 1975: Nonjury Trial on the Merits was Scheduled (But Not Held).

As this schedule of developments denotes, two and a half years after the litigation commenced and *after* the final pretrial conference, a motion was filed by Professor Heyn seeking, *inter alia*, to add a new cause of action for defamation, to request an award of attorneys' fees, to request a trial by jury, and otherwise to allege a deprivation of due process. Under any standard the motion to amend was untimely and the District Court acted within its discretion in dismissing the motion and the amendment as moot when the respondents were granted dismissal and summary judgment.

It is submitted that Professor Heyn's attempted amendment was nothing more than an effort to prolong his unwarranted presence in court and an indirect method of defeating the University's well founded motion for dismissal and summary judgment. The Trial Court acted properly in refusing to condone or permit such a spurious tactic by the petitioner. Ample support for refusing to permit the amendment is found in *Nevels v. Ford Motor Co.*, 439 F.2d 251, 257 (5th Cir. 1971):

> While it is generally true that leave to file amendments should be freely given, Fed. R. Civ. P. 15(A), amendments should be tendered *no later than the time of pretrial*, unless *compelling* reasons why this could not have been done are presented. (Emphasis added.)

Certainly, Heyn, the source and conduit of the information comprising the allegations in his Amended Complaint,

could not demonstrate a "*compelling*" reason for waiting until after the Final Pretrial Conference to make the instant motion which was obviously calculated to win for the petitioner another continuance. As in *Nevels, supra*, the Motion to Amend was properly disallowed. Furthermore, as *Nevels* teaches, it was the petitioner who had the burden of presenting the compelling reason for the last-minute proposed amendment. Heyn completely failed to carry his burden and the refusal to permit the amended pleading (whether due to mootness or otherwise) was therefore entirely justified.

The Court's attention is respectfully directed also to the cases of *Ricciuti v. Voltare Tubes, Inc.*, 277 F.2d 809 (2d Cir. 1960) (amendment should *not* have been permitted due to excessive delay); *United States v. An Article of Drug*, 320 F.2d 564, 573 (3d Cir. 1963) (permitting amendment *exceeded* court's discretion due to prejudicial nature of untimely allegations); *Stiegele v. J. M. Moore Import-Export Co.*, 312 F.2d 588 (2d Cir. 1963); *Caddy-Imler Creations, Inc. v. Caddy*, 299 F.2d 79, 84 (9th Cir. 1963) (no abuse of discretion in *refusing* to allow untimely amendment where plaintiff sought to change the legal theory of his case).

A further and equally valid reason for the disallowance of a motion to interject a non-federal cause of action for defamation into a 42 U.S.C. § 1983 civil rights suit is the failure of the putative amendment to state a claim upon which relief could have been granted. The controversy surrounding the so-called defamation involved only two letters written by respondent Manuel Ibanez in 1966 and 1967, when he was Chairman of the U.N.O. Department of Biology. These letters were written in the ordinary course

of business in 1966 and 1967, respectively, by Ibanez and were addressed to Dean Good. Basically, the two letters contain the same message: a recommendation from Chairman Ibanez to his superior, Dean Good, that an inquiry be made to determine if Professor Heyn should be allowed to retain his tenure. (R. 483 and 599.)

Ibanez stated reasons in support of his recommendation and, thereafter, Dean Good discussed the matter with his superior, Vice Chancellor for Academic Affairs, Dr. Branam. Subsequently, an administrative, and necessarily subjective, decision was made to forego any action on the Ibanez recommendation. The two letters were filed and never surfaced or became public until this litigation commenced and all University files on Heyn were turned over to Professor Heyn's attorneys in early 1975. Then, in late 1975, petitioner decided that he had been defamed by the two letters; hence, the Motion to Amend the Complaint.

Petitioner Heyn did not claim that his alleged injury due to defamation was actionable under 42 U.S.C. § 1983, and, clearly, it is not. *Morey v. Independent School District*, 312 F.Supp. 1257, 1263 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970) (per curiam). It was proper to refuse to countenance the filing of an untimely amendment containing a separate cause of action on a new legal theory relative to a non-federal claim. The Louisiana State Court system is well equipped to handle such claims and, indeed, it is extremely noteworthy that Professor Heyn, on March 31, 1976, filed a "Petition for Defamation" in the Civil District Court for the Parish of Orleans, State of Louisiana, entitled, *Anton N. J. Heyn v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, et al.*, No. 76-4937, Division "J", Docket 4.

(R. 698-713.)

While this is not the proper time for an in-depth discussion of the lack of merit in Dr. Heyn's libel claim, the Court can, nevertheless, take cognizance of the qualified privilege that attaches to communications of the kind in question, thereby voiding and defeating such defamation suits. First, it is well established that " ' the *mere* presence of derogatory information in confidential files' does *not* infringe an individual's liberty interest." *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975), citing *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); accord, *Kaprelian v. Texas Woman's University*, 509 F.2d 133, 139 (5th Cir. 1975).

Secondly, in *Greenya v. George Washington University*, 512 F.2d 556, 563 (D.C. Cir. 1975), an extremely pertinent and analogous case, Circuit Judge Wilkey held that:

> It is well accepted that officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution. Concomitantly we believe the privilege extends to internal records in which such matters are discussed or recorded. For a plaintiff to overcome the privilege he must prove that a publication occurred outside normal channels or that the normal manner of handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege or that publication was made with malicious intent. (Footnotes omitted.)

On the basis of *Greenya* and because Heyn has not shown (nor could he show) that the communications complained of between his Department Chairman (Ibanez) and his Dean (Good) occurred outside normal channels or resulted in an unreasonable degree of publication, the libel cause of action would be an appropriate target for a motion for summary judgment – which, of course, would only serve to further delay this case. It seems as though Heyn, in his hindsight, regrets that the respondents have always maintained privacy and confidentiality as to the Heyn file.

The doctrine of *Greenya* has very recently gained recognition and acceptance in Louisiana in *Alford v. Georgia-Pacific Corp.*, 331 So. 2d 558 (La. App. 1st Cir. 1976), which stands for the proposition that a conditional privilege attaches to statements made by an employer with respect to present or past employees to any person who has a "legitimate interest" in the subject matter. As the Louisiana Court ruled:

> We feel that it would be an undue burden to place on employers and would hopelessly hinder the free exchange of opinions between them if the law did not afford some form of protection. To hold otherwise would either tend to stifle communication of qualification and character evaluations, inherently subjective in nature, or alternatively, would breed deception in its wake. This we cannot condone as we feel community and societal interest dictate otherwise.
>
> 331 So. 2d at 562.

Professor Heyn belatedly asserted that he was professionally injured due to defamation by previously undisclosed letters contained in an intra-University file that was maintained in privacy and confidentiality. The District Court rightfully dismissed the amendment as moot since the federal claims were independently held invalid. In retrospect, one might review this Record and conclude that it was Dr. Ibanez, and not Heyn, who was injured. For example, in his deposition (R. 421), Heyn claimed that Chairman Ibanez was incompetent and went on to maintain that Ibanez had written only one two-page article and had obtained only one $4,000.00 grant. In fact, Dr. Ibanez has authored forty (40) scholarly articles and he has obtained for U.N.O. over $45,000.00 in educational or research grants. (R. 483 and 599 and Exhibits.)

In closing, it is noted that the Court of Appeals recently decided a similar issue involving a claim of reputation injury in *Wood v. University of Southern Mississippi*, 539 F.2d 529, 532 (5th Cir. 1976), and there held:

> . . .It was not until the discovery stage of this lawsuit that the immorality charges against [Plaintiff] surfaced. The injury to [Plaintiff's] reputation was thus inflicted at the trial and was not the result of any administrative action taken by the University. See *Ortwein v. Mackey*, 5th Cir. 1975, 511 F.2d 696, 699.
>
> 539 F.2d at 532.

III. *Summary Judgment on the Non-Prescribed Civil Rights Claims Was Proper*

Professor Heyn was employed at U.N.O. for thirteen

years, during which time he was never suspended or terminated (until his mandatory retirement at age 70 in May of 1976). Nevertheless, he found much to his disliking in terms of the personnel decisions made concerning him. While this was an unfortunate situation that caused considerable strife to many people, it is not a situation of constitutional dimensions. As the Supreme Court recently held in *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976):

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error . . .The Due process Claude of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

When petitioner's many claims are viewed in the context of the extensive, almost unending, discovery program conducted by his three attorneys, it is seen that summary judgment was proper not only for the one-year period (July 31, 1972-July 30, 1973) immediately preceding institution of suit, but, likewise, Rule 56, F.R. Civ. P., would have been applicable to the entire litigation, going back to 1963, had not the statute of limitations defense been available. 6 J. Moore, *Federal Practice* ¶56.04 [1] (2d ed. 1976).

As the Fifth Circuit stated recently in *Lester v. Hanover Insurance Co.*, 488 F.2d 976 (5th Cir. 1974):

> The facts were rather fully developed during extensive discovery and the submission of affidavits. The appellant was unable to add substance to the conclusory allegations of his complaint. Summary judgment is appropriate if there is no genuine issue as to any material fact to be resolved. *Cf.* Owens v. Diamond M Drilling Company, 487 F.2d 74 (5th Cir. 1973).

Similarly, in *Curl v. International Business Machines Corp.*, 517 F.2d 212, 213, (5 th Cir. 1975), the Court of Appeals reiterated the well-settled principle that:

> "[W]hen a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by *receivable facts* that a real, not formal controversy exists . . ." *Bruce Construction Corp. v. United States*, 242 F.2d 873, 875 (5th Cir. 1957).

As documented in the Factual Background, *supra*, and as further depicted throughout the voluminous Record, the petitioner has succeeded in adding absolutely no substance to the conclusory allegations of his Complaint. This is a lawsuit of conjecture and speculation with overtones of paranoia and despite the extensive and expensive undertakings of discovery there is not the slightest evidence that Professor Heyn was ever treated arbitrarily or capriciously.

As Chief Judge Brown stated in *DeBardeleben v. Cummings*, 453 F.2d 320, 324 (5th Cir. 1972), "[t]here is no impediment to the entry of summary judgment when the

dispute is verbal rather than factual." The Court further observed that it is only the District Court, not the adverse party, that must be satisfied that no genuine issue of fact exists. *Id.*

The Fifth Circuit has long recognized that the purpose of the summary judgment doctrine is not to be thwarted where the controversy is formal rather than real. *Bruce Construction Corp. v. United States*, 242 F.2d 873, 847-875 (5th Cir. 1957); *Wilkenson v. Powell*, 149 F.2d 335, 337 (5th Cir. 1945).

A recent federal decision that closely parallels the instant factual setting is *Cotten v. Board of Regents of the University System of Georgia*, 395 F. Supp. 388 (S.D. Ga. 1974), *aff'd mem.*, 515 F.2d 1098 (5th Cir. 1975), wherein the District Judge, in painstaking detail, documents and discusses an intra-faculty personality problem of the magnitude of Dr. Anton Heyn. In granting summary judgment for the defendants, the Trial Court concluded, 395 F.Supp. at 394:

> Further, the record is devoid of support for Dr. Cotten's theory that the defendants' action was constitutionally impermissible because taken for the purpose of punishing him for the exercise of his First Amendment rights to freedom of speech and association.
>
> * * *
>
> Finally, the plaintiff's claim of arbitrariness is patently meritless. The record is replete with instances of good faith attempts by the defendants tofind alternative resolutions to the nagging

> problems created by the Ahlquist-Cotten conflict. Good and valid factors were continually weighed by the defendants and no showing of arbitrariness appears in the record.

After over four years of litigation and an almost interminable discovery process, it is rather incredible that Professor Heyn's only basis for his allegedly discriminatory treatment is his outspoken claim against the idea of U.N.O. separating itself from the L.S.U. System, whether in name or otherwise. As documented in respondents' uncontroverted depositions, respondents were in *agreement* with petitioner on this issue, except to the extent that Chancellor Hitt at one time favored the change of name from L.S.U. N.O. to U.N.O. In other words, respondents Ibanez, Good and Branam (and Hitt as far as the issue of separation from the L.S.U. System was concerned) *agreed* and concurred with the sentiments of Dr. Heyn. This irrefutable situation illustrates clearly the sham and harassment of this lawsuit.

The hundreds of documents already before the Court, the authenticity and admissibility of which have been agreed upon, present a striking picture of Professor Heyn as the man whose personality clashed with numerous people, including superiors, contemporaries, and subordinates.

It is submitted that the legal standard by which Heyn's claim must be judged is: was his treatment arbitrary, frivolous or capricious? *Cotten, supra.* In *Blunt v. Marion County School Board*, 515 F.2d 951, 956 (5th Cir. 1975), Judge Coleman stated:

> For sound policy reasons, courts are loathe to intrude upon the internal affairs of local school authorities in such matters as teacher competency

Accord, *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Ferguson v. Thomas*, 430 F.2d 852, 857 (5th Cir. 1970); *Shanley v. Northeast Independent School District*, 462 F.2d 960, 967 (5th Cir. 1972).

Similarly, in *Markwell v. Culwell*, 515 F.2d 1258, 1260 (5th Cir. 1975), the Court affirmed a grant of summary judgment in favor of San Antonio College on the ground that the District Judge was correct in concluding that there was no evidence of a causal link between the plaintiff-teacher's statements and the defendants' termination of the plaintiff. Likewise, in *Kaprelian v. Texas Woman's University*, 509 F.2d 133 (5th Cir. 1975), notwithstanding the plaintiff's contention of discrimination due to the free exercise of her First Amendment freedoms, the Fifth Circuit stated, 509 F.2d at 137:

> A liberty interest arises, for example, when one is publicly subjected to a badge of infamy, such as being "posted" as a drunkard. In plaintiff's context, it arises when an employee is able to demonstrate that the State has made a charge "that might seriously damage his standing and associations in his community" or that is of such a nature as to impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Such a showing is the employee's voucher of admission to the arena of procedural due process; *without it such questions do not arise.* Moreover, to raise a liberty interest such charges *must be public ones;* we have recently held that even

> charges of the most damaging nature do not do so by their mere presence in confidential files. (Emphasis added.)

See also *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975).

It is established beyond any possibility of doubt that respondents have never made public charges against Professor Heyn. In fact, Heyn freely conceded such in his Deposition at pages 100-101 (R. 421). This in itself precluded any issue of fact for trial in the lower court. *Paul v. Davis*, 424 U.S. 693 (1976). The personnel file maintained by the University relative to Heyn does not reflect defamatory or unconstitutional charges; rather, these records document a story of ten long, hard years of administrative negotiations and constant communications, whereby Drs. Carlton, Ibanez, Good, Branam, Hitt, and Laseter have tried, often without success, to create harmony in the Department of Biology and to insure that every faculty member was treated fairly and equitably according to individual merit and based on reasonable, objective and just factors according to the circumstances as they appeared at the time. This is the essence of what Judge Alaimo referred to as *"the exercise of . . . sound judgment." Cotten, supra*, 395 F.Supp. at 392. Again, it must be emphasized that in ruling on the motion for summary judgment it was only necessary that the Court below analyze this suit over the period of the July, 1972 - July, 1973 twelve-month period in that this is the only relevant time frame in view of the statute of limitations. As to that one-year period discovery illustrated the absence of a genuine issue as to any material fact and thus respondents were entitled to judgment as a matter of law.

The Court's attention is further directed to the analogous situation that arose in *Morey v. Independent School District*, 312 F.Supp. 1257, 1262 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970) (per curiam). There District Judge Lord, in granting defendants' Motion for Dismissal due to lack of jurisdiction, held:

> The holding and policy of *Freeman* is applicable to this case. This Court is unaware of any Minnesota statute or regulation entitling plaintiff to periodic salary increases. Insofar as the defendant school district may customarily grant increases in salary to its teachers, this is an internal matter to be handled by the school board. The failure or refusal of the board to grant a customary increase in salary does *not* entitle plaintiff to bring an action in federal court under the Civil Rights Act.
>
> * * * *
>
> . . .Furthermore, the statement in her complaint that the failure to grant said increases is in violation of her "due process and equal protection rights" does *not* state a cause of action.
>
> 312 F.Supp. at 1262 (emphasis added).

In affirming, the Eighth Circuit expressly approved of Judge Lord's reasoning and adopted his opinion as its own. 429 F.2d 428 (8th Cir. 1970). See also *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969).

In Louisiana, like Minnesota, there is no statute or regulation giving L.S.U. System employees, such as Dr. Heyn, automatic salary increases. In fact, until 1974 and 1975,

there had not been any automatic cost of living increases (R. 556, Response No. 7); rather, previously by the Regulations and By-Laws of the L.S.U. System, all such increases were on the basis of merit. Now, petitioner is asking this Court to pass judgment on his professional and academic merit or lack thereof. This is precisely what the courts have time and again refused to do. A familiar holding in the Fifth Circuit is that "[i]t is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools." *Augustus v. School Board of Escambia County*, 507 F.2d 152, 155 (5th Cir. 1975); *Wright v. Houston Independent School District*, 486 F.2d 137, 138 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); *Keys v. Sawyer*, 353 F.Supp. 936, 939-40 (S.D. Tex. 1973). Federal courts elsewhere have likewise abstained from interfering in campus affairs. See, *e.g.*, *Robinson v. Board of Regents*, 475 F. 2d 707, 710 (6th Cir. 1973); *Depperman v. University of Kentucky*, 371 F.Supp. 73, 76 (E.D. Ky. 1974).

An appropriate response to Professor Heyn's request for judicial intervention was framed by the Fifth Circuit in *Augustus v. School Board of Escambia County, supra*, 507 F.2d at 158:

> It is not the responsibility of the federal courts, however, to run public schools absent an abrogation of the responsibility by those whose duty it is to run a constitutionally acceptable school system.

Respondents submit that Heyn has failed to sustain, even minimally, his burden of demonstrating an "abrogation of responsibility" by the University officials.

CONCLUSION

The decisions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit are in complete accord with the applicable decisions of this Court regarding the appropriate statute of limitations in cases filed pursuant to Title 42 U.S.C. Section 1983. The Petition for Certiorari offers no special or important reason why this Court should review a clearly correct decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

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November 18, 1977

CERTIFICATE OF SERVICE

I, Rutledge C. Clement, Jr., hereby certify that three copies of the foregoing Brief by Respondents in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon counsel for Anton N.J. Heyn, petitioner, by depositing same in the United States mail, properly addressed and postage prepaid, this 18th day of November, 1977, as follows:

Robert E. Barkley, Jr., Esq.
Sessions, Fishman, Rosenson,
Snellings & Boisfontaine
2100 Bank of New Orleans Building
New Orleans, Louisiana 70112

It is further certified that all parties required to be served have been served.

This is the 18th day of November, 1977, at New Orleans, Louisiana.

_____
RUTLEDGE C. CLEMENT, JR.